INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2– 4
Statutes Involved	2– 4
Question Presented	4
Statement of the Case	5– 7
A. Facts	5– 7
B. Stage at which Federal Question Raised	7
The Question is Substantial	8–11
Appendix A—Opinions Below	15–30
Appendix B—Order Appealed From	31

TABLE OF CITATIONS.

Cases:

PAGE

Warren Trading Post Co. v. Arizona Tax Commission, et al., 380 U. S. 685 (1965) 3

Standard Oil Company of California v. Johnson, Treasurer of California, 316 U. S. 481 (1942) .. 3

Muir v. Samuels, 100 Ky. 605, 62 S. W. 481 5

Marcum v. Louisville Public Housing Commission, Ky., 374 S. W. 2d 865 5

Louisville Gas Co. v. Coleman, 277 U. S. 32 8

Atchison, Topeka & Sante Fe R. R. Co. v. Matthews, 175 U. S. 92 9

Statutes:

Kentucky Revised Statutes 139.480(8) 3

Kentucky Revised Statutes 139.170 4

United States Constitution, Amendment Fourteen ..... 3 et-seq.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

SPALDING LAUNDRY & DRY CLEANING COMPANY, - - - - - - - *Appellant,*

v.

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

JURISDICTIONAL STATEMENT.

This is an appeal by the Spalding Laundry & Dry Cleaning Company ("Spalding") from the judgment of the Court of Appeals of Kentucky entered on February 21, 1969, reversing the judgment of the Jefferson Circuit Court and affirming an order of the Kentucky Board of Tax Appeals assessing a sales and use tax on the purchase of certain manufacturing equipment made by Spalding.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Court of Appeals of Kentucky is reported at 436 S. W. 2d 522, and is set forth herein in Appendix A. The opinion of the lower court, the Jefferson Circuit Court, Chancery Branch, is not contained in the official reports but is set forth in Appendix A and the order of the Kentucky Board of Tax Appeals (No. K-65-R-5) is likewise set forth in Appendix A.

JURISDICTION.

This matter commenced with a ruling by the Kentucky Department of Revenue that certain items of machinery (such as boiler parts) purchased in an expansion of Appellant's business did not fall within the exemption provisions of the Kentucky Sales and Use Tax Law, Kentucky Revised Statute 139.480(8) as defined by Kentucky Revised Statute 139.170. The Kentucky Board of Tax Appeals upheld the Department and this ruling was appealed to the Jefferson Circuit Court.

The Circuit Court reversed the Board of Tax Appeals and held that the denial of the exemption to this Appellant was a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. A copy of this decision is found in Appendix A.

The Department of Revenue appealed this decision to the Kentucky Court of Appeals which reversed the lower court and reinstated the order of the Board of Tax Appeals. This opinion was handed down on

October 25, 1968 and Appellant's Petition for Rehearing was overruled on February 21, 1969 and the mandate issued that same date. A copy of this Order is set forth in Appendix B.

Appellant's Notice of Appeal to this court was filed in the Court of Appeals of Kentucky on March 26, 1969, within the statutorily prescribed period.

The question involved is the constitutionality, under the Fourteenth Amendment of the United States Constitution, of KRS 139.170 which limits to manufacturing industries the broad exemption set forth in KRS 139.480(8).

The Kentucky statute was found to be in violation of the Fourteenth Amendment by the lower court, but the Kentucky Court of Appeals reversed and expressly rejected Appellant's direct challenge of the statute's constitutionality. The Supreme Court clearly has jurisdiction to review the decision of the Court of Appeals by direct appeal under the provisions of 28 U.S.C. § 1257(2). *Warren Trading Post Company* v. *Arizona Tax Commission, et al.*, 380 U. S. 685 (1965); *Standard Oil Company of California* v. *Johnson, Treasurer of California*, 316 U. S. 481 (1942).

The Kentucky Statutes that are directly involved are as follows:

Acts of the General Assembly of the Commonwealth of Kentucky, Regular Session 1960, Chapter 5, Article I, Section 47(h), page 24.

> "KRS 139.480. Any other provisions of this chapter to the contrary notwithstanding, the terms 'sale at retail,' 'retail sale,' 'use,' 'storage,' and

'consumption,' as used in this chapter do not include the sale, use, storage or other consumption of: . . .

(8) Machinery for new and expanded industry."

Acts of the General Assembly of the Commonwealth of Kentucky, Regular Session 1960, Chapter 5, Article I, Section 17, page 16.

"KRS 139.170. 'Machinery for new and expanded industry' shall mean that machinery used directly in the manufacturing process, which is incorporated for the first time into plant facilities established in this state, and which does not replace machinery in such plants."

QUESTION PRESENTED.

Whether or not the taxing of a sale of Machinery to a "service" industry and exempting from the tax an identical sale to a "manufacturing" industry is arbitrary and unreasonable and in violation of the equal protection clause of the Fourteenth Amendment when the basis of the classification as between manufacturing and service industries has no substantial relationship to the object sought to be achieved by the legislation.

STATEMENT OF THE CASE.

A. Facts.

The Appellant, Spalding, operates a laundry and dry cleaning business in Louisville, Kentucky and in recent years has purchased many pieces of new machinery to expand existing facilities, for the addition of new special services, and for equipping additional outlets at new locations.

The Appellee, Department of Revenue, is undertaking to collect a sales tax on the purchase of this equipment although there is no question that it was purchased for new and expanded facilities. It is agreed that under Kentucky law the Appellant, Spalding, is engaged in a "service" industry and not in a "manufacturing" industry, *Muir* v. *Samuels*, 100 Ky. 605, 62 S. W. 481.

The Kentucky sales tax statute places the tax on the vendor, but requires him to collect the tax from the vendee and remit it to the state. *Marcum v. Louisville Public Housing Commission*, Ky., 374 S. W. 2d 865. The act grants a broad exemption on sales made of "machinery for new and expanded industry," Kentucky Revised Statutes 139.480(8), but in a separate section the act undertakes to classify industries and limit the exemption to sales to manufacturers, Kentucky Revised Statute 139.170. If this classification is upheld then Spalding is not entitled to the exemption on its purchases.

The legislative purpose of the broad exemption for new and expanded industry is to encourage both the

location of new industries in Kentucky and the expansion of existing ones. This is agreed to by counsel for the Appellee and was so found by the lower court in Kentucky. The lower court's opinion states as follows (Appendix A, pp. 24, 25):

> "The purpose of the legislation was to stimulate industry that is presently operating in the Commonwealth of Kentucky and to encourage new industry to come into Kentucky. The economic growth of Kentucky and the prosperity of its citizens is no less sought, stimulated or desired from service industries than from manufacturing industries. They are both sought and needed. Service industries are more numerous and usually have less financial investment. The desirability in the Commonwealth of a service industry is no less than a manufacturing industry. As a matter of fact many of the smaller communities in this Commonwealth can, and as a matter of fact, are benefited from service industries where they have no possibility of securing aid from a manufacturing industry. The economic help available for the Commonwealth of Kentucky as a whole, with special emphasis on the smaller communities, is stimulated by service industries. 'Machinery for new and expanded industry' is just as necessary and important for service industries as to manufacturing industries.
>
> "This Court, as well as counsel for appellant, [Spalding] agrees with the statement of counsel for appellee [Department of Revenue] which appears on page 3 of his brief filed with the Kentucky Board of Tax Appeals that:

> * * * The purpose of the exemption for new and expanded industry was clearly intended to encourage the location of new industry in this state and the expansion of existing industry. * * *.
>
> "There is no contention made that the establishment of a new service industry, or the expansion of an existing service industry is not as much for the benefit of the public at large, or is less related to the purpose for which the tax is imposed, than is the establishment of a manufacturing industry or the expansion of a manufacturing industry. There is no difference in the end to be accomplished."

Since this opinion was rendered, counsel for the Department of Revenue has apparently changed his position and the Court of Appeals of Kentucky has gone along with him (Appendix A, p. 15), but the *fact* remains that the classification is an arbitrary one that is expedient for purposes of raising revenue but denies to this Appellant and others similarly situated the equal protection of the laws.

B. Federal Question.

The Federal question in this case was presented in the initial stages before the Board of Tax Appeals (Appendix A, pp. 27-28). Subsequently the question was presented to the Circuit Court which held that the attempted classification violated the provisions of the Fourteenth Amendment (Appendix A, p. 20, *et seq.*) and the question was placed before the Kentucky Court of Appeals which ruled adversely to this Appellant (Appendix A, p. 15, *et seq.*).

THE QUESTION IS SUBSTANTIAL.

The amount of tax dollars involved in this particular bit of litigation is not substantial, the principles involved are. Much may be made of the fact that there is a technological difference between a manufacturing industry and a service industry, but there is no difference which relates to the purpose of this particular legislation. If this classification is permitted to stand, then a serious inroad has been made in the basic guidelines of permissible discrimination through classification.

In *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, Mr. Justice Sutherland made this statement of the law (at p. 37 of the opinion):

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed.

722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin* v. *District of Columbia,* 205 U. S. 135, 139; *Bell's Gap R.R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237." (Emphasis ours.)

In *Atchison, Topeka & Santa Fe R.R. Co.* v. *Matthews,* 175 U. S. 92, the essence of equal protection is again discussed by the Court in the following language, commencing at page 104 of the opinion:

". . . the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact

> that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. *Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed.*" (Emphasis ours.)

The classifications in the present case do not meet the well known criteria set forth in the above cited authorities, and if this case is not heard on its merits and reversed the door is well opened to state legislative discrimination based solely upon the narrow whims of the moment.

One example of the absurdity of the results of this classification is the purchase by Spalding of parts of a new boiler which it is agreed were for the expansion of the Appellant's business. The sales tax in question is on the vendor of these parts and if the vendor sells the boiler to a shirt manufacturer for the expansion of his business the tax does not apply, whereas if the identical boiler is sold to expand Spalding's business of laundering the shirts the tax does apply. We submit that this is arbitrary and unreasonable.

The decision by the Court of Appeals of Kentucky in this case should be reversed and we ask that probable jurisdiction be noted by the Supreme Court to avoid

this serious departure from the basic doctrines of permissible classifications for taxation under the equal protection clause of the Fourteenth Amendment to the Constitution.

Respectfully submitted,

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